- Decline to impose additional restrictions on interactions between ISPs and ILECs. The NOI inquires what, if anything, the Commission should do to promote provisioning of xDSL services by ILECs that does not bundle or direct customers to an affiliated ISP,[48] and similarly asks "whether interactions between ISPs and providers of last miles will require regulatory intervention."[49] The Commission must resist the temptation to impose even greater constraints on interactions between ILECs and ISPs. Clearly, there is no reason to believe that the existing panoply of regulations governing such interactions – including the *Computer III, ONA,* affiliate transaction, CPNI, and network disclosure rules – requires supplementation to be effective. After all, the recent *Internet over Cable* Report states that there are more than 4800 ISPs in the United States,[50] and this number keeps growing.

In addition, the Commission's assumption that xDSL services are bottlenecks is untenable.[51] The *Internet over Cable* report details the tremendous technical capabilities and increasingly widespread deployment of cable modem service, which can transmit information at rates far greater than ADSL.[52] In addition, a multitude of

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[48] *Id.*, ¶ 38.

[49] *Id.*, ¶ 79.

[50] *Internet over Cable*, page 18.

[51] As explained in Section III.A above, the electronic equipment needed to provide advanced services is readily available, and ILECs already must provide conditioned loops on an unbundled basis and permit collocation of the equipment in their central offices.

[52] *Internet over Cable*, pages 75-80.

CLECs, in their oppositions to the various RBOC 706 petitions, trumpeted the capabilities and ubiquity of own xDSL offerings.[53] Of course, there are also many other sources for high-speed Internet access, including a variety of terrestrial wireless and satellite services.[54]

In short, the ILECs have no chokehold on high-speed Internet access and, indeed, are relative newcomers to the market. Moreover, such potent competitors as AT&T/TCG/TCI/BT and MCI/WorldCom/MFS/Brooks/UUNet do not suffer from limitations on bundling or jointly marketing high-speed access and ISP offerings. Accordingly, there is no justification for placing still further restraints on the ability of ILECs (or their CLEC and ISP affiliates) to do the same.

- Remove economic disincentives to upgrading the "last mile." Existing ILEC facilities used to provide the "last mile" to the customer have been efficiently designed and engineered (through the use of digital loop carrier, bridge taps, and the like) to transmit basic voice grade services. To encourage modification and upgrades of the voice grade network to support advanced telecommunications capabilities, the Commission and state PUCs will have to establish a pricing framework that provides

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[53] *See, e.g.*, petition of the Association for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-78, at 4 (filed May 27, 1998) ("CLECs ... are at the forefront in deploying new digital subscriber line ('xDSL') technologies"); *id.* at 9 ("CLECs are aggressively providing digital services throughout the nation using xDSL and other technologies.").

[54] *See* Section II.A, *supra*.

the correct economic incentives for incumbents and new entrants alike, including a reasonable opportunity to earn a sufficient return on their investment.

Providing such an opportunity in a competitive environment means permitting local residential rates to reflect underlying costs and assuring that unbundled loop prices reflect the costs of provisioning an actual (not hypothetical) advanced telecommunications network. If local rates or UNE prices are set too low, neither the ILEC nor other providers will have an incentive either to upgrade the network or deploy new facilities. Ubiquitous deployment of advanced telecommunications capabilities in both residential and business markets can be achieved only if the pricing of such capabilities and all inputs provides compensation commensurate with the risks incurred. The APT Petition referenced in the NOI underscores these points and accurately depicts the response of competitors to appropriate economic signals.[55]

Along these same lines, geographic rate averaging at the state level and remaining limitations on deaveraging in interstate access tariffs plainly deter investment in competitive facilities in relatively high-cost rural areas while encouraging over-investment in relatively low-cost urban areas. From the perspective of a new entrant, there is no rational justification for investing in rural areas because the ILEC's retail rates are capped below cost, rendering it virtually impossible to compete. From the ILEC's perspective, the incentive to invest in rural areas is similarly blunted because the cost of doing so cannot be reflected in the rates for services. By eliminating regulatory constraints on geographic rate averaging (while reforming universal service support to

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[55] *See* NOI, ¶ 72.

address any affordability concerns), the Commission and state PUCs can restore appropriate investment incentives. In all likelihood, such action would jump-start deployment of advanced telecommunications capability and services in rural areas.

- Preempt state regulation that prevents or impedes competition by ILECs.

While most states have welcomed competition by affiliates of ILECs, a very few, for procedural or other reasons, have declined to authorize CLEC affiliates of an ILEC to operate in-region. Such failure is a direct violation of Section 253 of the Act. Under the Commission's rules, the ILEC cannot directly offer interexchange or CMRS services, but a separate affiliate may do so. Thus, to meet consumer demand for integrated packages of services, including advanced services, an ILEC's parent must offer advanced services through the separate affiliate as well. Consequently, state decisions prohibiting a separate, in-franchise affiliate of the ILEC from offering local exchange services effectively prevent competition by a vital participant in the bundled service market. While the Commission is correct that it must "cooperate" with state commissions in removing barriers to infrastructure investment,[56] it must also preempt state regulations that "prohibit or have the effect of prohibiting" the provision of advanced (or any other) services, as specifically provided in Section 253(d) of the Act.[57]

- Assure that all providers of advanced services have nondiscriminatory access to new, high-bandwidth spectrum. It is likely that additional spectrum will be either

[56] NOI, ¶ 83, citing 1996 Act, Section 706(a).

[57] 47 U.S.C. § 253(d).

required or made available for high-bandwidth wireless services.[58] The principle of symmetric, minimally intrusive regulation requires that all service providers have access to that spectrum without regard to ILEC status or spectrum cap limitations applicable to existing CMRS services. There is no rational justification for restricting ILECs' access to this new spectrum.

- Permit ILECs to introduce new switched access services without first petitioning for approval of new rate elements. Under the current access charge rules, an ILEC seeking to introduce a new switched access service must first file a petition demonstrating that the establishment of a new rate element or elements would be in the public interest.[59] This requirement permits the ILEC's competitors to delay the introduction of a new service by filing meritless oppositions to the petition. No other class of competitors, of course, is subject to such regulatory gamesmanship. The Commission should eliminate this obstacle to innovation and competition by permitting ILECs to introduce new switched access rate elements as needed to accommodate new services, just as is the case for special access.

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[58] Public Notice, "Commission Staff Seeks Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000," DA 98-1703, Report No. IN-98-48 (Aug. 26, 1998).

[59] 47 C.F.R. § 69.4(g)(i) (1997). Under section 69.4(g)(ii), a petition is also necessary even if another ILEC has obtained authority to add a new rate element, although the required showing is somewhat different.

By promoting symmetric regulation of all entities offering advanced services, these actions will go a long way toward eliminating disincentives to ILEC investment in advanced telecommunications capability and deployment of advanced services.

IV. CONCLUSION

The NOI proceeds from the appropriate premise: that maximum reliance on the free market and private enterprise will result in "reasonable and timely" deployment of advanced telecommunications capability. A multitude of providers, using a broad diversity of delivery platforms, is bringing a plethora of advanced services to market. Notably, these services are not aimed solely at businesses in urban areas. GTE, other ILECs, and cable companies are all offering high-bandwidth services to residential and small business customers both within and outside major population centers. There is, therefore, no evidence of market failure that necessitates affirmative regulatory action.

This is not to say, however, that the regulatory environment today is consistent with the NOI's free-market premise; it clearly is not. Notwithstanding the intense competitiveness of advanced services markets, the fact that many competitors are global, vertically integrated companies with tremendous financial and technical resources, and the unconstrained availability of virtually all necessary inputs, a single category of competitors – the ILECs – continues to labor under highly burdensome and intrusive regulation. This regulatory asymmetry is unquestionably destructive. It distorts incentives for ILECs and their competitors alike and deters investment, particularly in rural and other high cost areas.

Continued disparate treatment of ILEC advanced services offerings is antithetical to Congress's goals in enacting Section 706 of the 1996 Act. The Commission therefore should promptly take the actions discussed above to assure that (1) all providers of advanced services are deregulated to the greatest possible extent and treated the same, and (2) no new disabilities are placed on ILECs as they strive to compete against the huge AT&T, MCI/WorldCom, and Sprint combines and cable MSOs. By accepting GTE's recommendations, the Commission will expedite the deployment of advanced telecommunications capability and services to all classes of customers and geographic areas and implement the will of Congress.

Respectfully submitted,

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